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No. 91-943

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, PETITIONER

v.

RALPH JOSEPH WALKER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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TABLE OF AUTHORITIES

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1. Respondent contends that this Court lacks jurisdiction because the government's suggestion of rehearing en banc did not toll the time in which to file a petition for a writ of certiorari. Br. in Opp. 2-3. That contention is without merit.

A suggestion of rehearing en banc, standing alone, does not toll the time for filing a petition for a writ of certiorari.[1] That rule, however, has no applica-

[1] Sup. Ct. R. 13.4 provides:

> [I]f a petition for rehearing is timely filed in the lower court by any party in the case, the time for filing the petition for a writ of certiorari * * * runs from the date of the denial of the petition for rehearing or the entry of a subsequent judgment. A suggestion made to a United States court of appeals for rehearing en banc pursuant to Rule 35(b), Federal Rules of Appellate Procedure, is not a petition for rehearing within the meaning of this Rule.

tion in this case because the government filed not only a suggestion of rehearing en banc, but also a petition for rehearing. Respondent's contention, Br. in Opp 2-3, that the government filed only a suggestion of rehearing en banc is unsupported by the record. On May 17, 1991, the government filed a timely motion for a 30-day "extension of time in which to file a Petition for Rehearing and Suggestion for En Banc Consideration." 5/17/91 Gov't Mot. 1. The court granted the motion, extending the government's time for filing until June 20, 1991. 5/31/91 Order 1. On June 19, 1991, the United States filed a pleading styled, "Petition for Rehearing and Suggestion for En Banc Consideration." Gov't C.A. Pet. 1. That pleading invoked not only Fed. R. App. P. 35, which pertains to rehearing en banc, but also Fed. R. App. P. 40, which pertains to petitions for rehearing. Gov't C.A. Pet. 1.[2]

In any case, this Court held in *Missouri* v. *Jenkins*, 495 U.S. 33, 45-47 (1990), that when a court of appeals interprets and actually treats a pleading, however styled, as a petition for rehearing, the disposition of that pleading starts the period within which to file a petition for a writ of certiorari. Here, the court of appeals understood the government's pleading to re-

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[2] The government's pleading at one point asserts that the United States "hereby petitions for a rehearing of the instant appeal by this Honorable Court en banc." Gov't C.A. Pet. 1. It is evident, however, from the caption of the pleading and the citation of Fed. R. App. P. 35 and 40 that the government was filing both a petition for rehearing *and* a suggestion of rehearing en banc. Indeed, the very next sentence in the pleading states that "[t]his Petition for Rehearing and Suggestion for En Banc Consideration has been personally authorized by the Solicitor General * * *." Gov't C.A. Pet. 1.

quest not only rehearing en banc, but panel rehearing as well. In its August 13, 1991, order denying the suggestion of rehearing en banc, the full court noted that "by separate order the panel denied the petition for rehearing." Pet. App. 13a. The same day, the panel issued an order both denying the petition for rehearing and setting forth a supplemental opinion that responded to arguments raised in the petition for rehearing. Pet. App. 15a-24a.[3] The time for filing the petition in this case therefore commenced on August 13—"the date of the denial of the petition for rehearing," Sup. Ct. R. 13.4. The petition for a writ of certiorari was timely filed. See Pet. 1-2.

2. In support of his contention that this case does not warrant the Court's review, Br. in Opp. 6-9, respondent merely rehearses the reasoning set forth in the opinions of the court of appeals. Respondent first argues that the court "did not adopt a bright line test," but decided the case upon the totality of the circumstances that surrounded the seizure. *Id.* at 6. That assertion is contradicted by the text of the opinion below. The court of appeals made clear that it adhered to the rigid rule, announced in *United States* v. *Guzman*, 864 F.2d 1512, 1519 (10th Cir. 1988), that "[w]hen the driver has produced a valid license and proof that he is entitled to operate the car, he must be allowed to proceed on his way, without being subject to further delay by police for additional questioning." Pet. App. 6a.

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[3] As this Court has observed, "[a] petition for rehearing is designed to bring to the panel's attention points of law or fact that it may have overlooked." *Missouri* v. *Jenkins*, 495 U.S. at 46 n.14. The panel in this case issued a supplemental opinion because it had "failed to address [the government's] argument that the detention was lawful even in the absence of any reasonable suspicion." Pet. App. 17a.

Respondent next contends that the record evidence fails to establish the public interest underlying the questions asked by Officer Graham; the asserted interest in narcotics interdiction, in respondent's view, is a post hoc justification for unlawful police conduct. Br. in Opp. 7-8. Respondent supports his claim by citing Officer Graham's testimony that he did not suspect that respondent was engaged in any criminal activity when he asked the questions about illegal contraband. *Id.* at 7. That argument, however, merely assumes respondent's conclusion that Officer Graham needed reasonable suspicion before he could ask three or four brief questions regarding the presence of contraband in a validly stopped vehicle. The absence of reasonable suspicion, however, cannot be equated with an absence of any governmental interest in conducting investigative inquiries. See, *e.g.*, *Michigan Dep't of State Police* v. *Sitz*, 110 S. Ct. 2481 (1990). Respondent does not, and could not, see Pet. 10-11 & n.4, contest the acknowledged strong public interest in interdicting alcohol, illegal drugs and paraphernalia for their use, and weapons on the Nation's highways—an interest that the decision below makes considerably more difficult for law enforcement officers to vindicate.[4]

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[4] Respondent contends that Officer Graham's questions were not reasonably related to the purpose of the stop because Officer Graham was not concerned about the speeding violation, but was merely "curious" when he asked the questions about contraband. Br. in Opp. 8. Officer Graham's subjective motivation, however, has no bearing on the reasonableness of his brief inquiries under the Fourth Amendment. See, *e.g.*, *Scott* v. *United States*, 436 U.S. 128, 138 (1978) ("We have * * * held that the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invali-

Respondent finally contends that the degree of intrusion at issue is more than minimal because (1) being pulled to the side of the road creates substantial anxiety; (2) respondent feared that he was going to be arrested at any moment; and (3) Officer Graham's question regarding large quantities of cash was intrusive. Br. in Opp. 8-9. Those arguments are without merit. First, the court of appeals held, Pet. App. 7a, and respondent does not contest, that the initial stop was valid; the intrusion of being pulled to the side of the road is therefore not at issue in this case. Second, respondent's personal fear of being arrested is irrelevant; this Court has indicated that the degree of intrusion is measured, for Fourth Amendment purposes, in terms of the fear and surprise that would be felt by "lawful travelers," *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 558 (1976), and not by a motorist carrying large quantities of contraband. Cf. *Sitz*, 110 S. Ct. at 2486 ("The 'fear and surprise' to be considered are not the natural fear of one who has been drinking over the prospect of being stopped at a sobriety checkpoint, but, rather, the fear and surprise engendered in law abiding motorists by the

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date the action taken as long as the circumstances, viewed objectively, justify that action."). Respondent also claims that Officer Graham testified that his questions were a deviation from Emery County police practice, Br. in Opp. 8, but the record does not support that claim. In the portion of the transcript that respondent cites, Officer Graham responded affirmatively to defense counsel's question whether the procedure for a traffic stop "basically * * * is to give the Defendant a citation and ask him to sign it" and to provide the defendant with "a Request to Appear by Mail." Tr. 27. This exchange describes the basic outlines of the typical citation procedure; it does not establish that it was a deviation from Emery County's established practice for an officer to ask a few brief questions about contraband during the course of a traffic stop.

nature of the stop."); *Florida* v. *Bostick*, 111 S. Ct. 2382, 2388 (1991) (for Fourth Amendment purposes, "the 'reasonable person' test presupposes an *innocent* person"). Third, although we believe that, in context, Officer Graham's questions were minimally intrusive, see Pet. 13 n.6, respondent errs in measuring the intrusion by reference to the questions as such. The court of appeals indicated that the same questions would have been permissible had Officer Graham asked them before receiving the results of the National Crime Information Center (NCIC) computer check on respondent's vehicle, Pet. App. 9a n.2; the intrusion at issue, therefore, is the brief delay involved in asking the otherwise permissible questions after the NCIC check was completed. See Pet. 13. This Court's decisions establish that so minimal an intrusion, incidental to an otherwise valid traffic stop, is permissible even in the absence of reasonable suspicion. See *Martinez-Fuerte*, 428 U.S. at 547, 560, 563 (upholding three to five minutes of questioning at secondary checkpoint); see also *New York* v. *Class*, 475 U.S. 106, 115 (1986) (police may intrude into passenger compartment to see vehicle identification number); *Pennsylvania* v. *Mimms*, 434 U.S. 106, 109-111 (1977) (police may ask motorist to exit vehicle).

3. What is more significant than the arguments respondent makes are the arguments he does not make. As we have explained, Pet. 9, 13-14, we believe that the court of appeals' decision conflicts with this Court's decisions in *Martinez-Fuerte*, *Class*, and *Mimms* by condemning a *de minimis* intrusion that serves substantial governmental interests in interdicting alcohol, illegal drugs and paraphernalia for their use, and weapons on the Nation's highways. Respond-

ent does not even cite *Class* or *Mimms*, much less explain why the decision of the court of appeals does not conflict with them. And while respondent cites *Martinez-Fuerte* in passing, for the uncontroversial principle that a traffic stop constitutes a Fourth Amendment seizure, Br. in Opp. 7, he makes no effort to explain how the decision below can be squared with that case.

For the foregoing reasons and those given in the petition, it is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

KENNETH W. STARR
Solicitor General

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